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No. 96-563

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

Hartley Marine Corp., The Ohio River Company, and Crounse Corporation,
Petitioners

v.

James H. Paige III,
State Tax Commissioner of West Virginia,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

Brief of *Amicus Curiae* American Waterways Operators, Inc. In Support of Petitioners

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BRIEF OF *AMICUS CURIAE* AMERICAN WATERWAYS OPERATORS IN SUPPORT OF PETITIONERS[1]

INTEREST OF *AMICUS CURIAE*

The American Waterways Operators, Inc. (AWO), is a non-profit national trade organization that has represented the interests of domestic water transportation operators since 1944. Approximately 300 companies, including many tug and barge operators, are members of the AWO.

The AWO has been involved in formulating maritime legislation and in developing maritime case law for over forty-five years. It has participated in proceedings before this Court, both as an *Amicus Curiae* and as a party. The AWO believes that the present case involves legal issues that could have far-reaching effects on the uniformity of state law throughout the United States. Moreover, the decision below has the potential for frustrating the legitimate reliance interests of the AWO membership and for undercutting the cost structure of the domestic water transportation industry.

A focus of the case below was on the alleged violation by West Virginia of the free-river doctrine, initially proclaimed in the Northwest Ordinance and the Virginia Compact. By threatening the continued vitality of the Northwest Ordinance and the Virginia Compact, the case below has serious implications for water transport in the Ohio river basin and adjoining area. The commerce clause issues addressed in this brief affect the entire network of inland and coastal waterways of the United States, as well as the Great Lakes.

Compared to other constitutional issues of the day, this case may seem to raise arcane issues of taxation. One reason is that, until West Virginia's action that led to the case below, the free-river doctrine has been so taken for granted in modern times that most lawyers are unaware of its existence. Moreover, the Northwest Ordinance and the

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[1]This brief is filed pursuant to the consent of the parties.

Virginia Compact, both of which are implicated by the West Virginia tax, are the stuff of high school history courses, long forgotten by most. Neither provision has figured prominently in recent litigation.

The issues raised in this case are of critical importance to the AWO. The water transportation industry operates over 7,000 tugboats and towboats and over 30,000 barges. In 1992, over one billion tons of domestic commerce moved on the inland waterways. In the same year, over $22 billion worth of exported goods were carried by barge. The industry hauled about two-thirds of all the grain exported by the United States, 20 percent of all the coal produced in the country, 30 percent of the nation's petroleum products, and 20 percent of the exported logs and wood chips.

Although most people do not experience first hand the large amount of cargo that moves up and down the nation's rivers, the inland waterways system is a major contributor to the American economy. Over 30,000 miles of navigable highways exist, of which more than 25,000 miles have been improved under the direction and control of the federal government. The inland water transportation industry generates over 70,000 jobs and contributes over $400 million in federal payroll taxes. The private sector employment associated with the inland waterways is about 175,000 persons. Accordingly, the present case has major economic implications for the nation, affecting the inland water transportation industry and its many customers.

By inference, other major industries also may be affected. If the Commerce Clause permits West Virginia to tax fuel used by a tow boat when it travels through that State en route from Pennsylvania to Kentucky, as the State argues in this case, then the coastal and Great Lakes shipping industries are also put at risk. A ship traveling from Boston to New York through the coastal waters of Rhode Island, for example, might be subject to a Rhode Island fuel tax.

SUMMARY OF ARGUMENT

This case involves the constitutionality of the West Virginia excise tax on special fuels, as applied to watercraft engaged in interstate commerce. The focus of this *Amicus Curiae* brief is on the constitutionality of that tax under the Commerce Clause as it applies to Petitioners' watercraft traveling on the Ohio River through West Virginia in transit between points outside that State.

Petitioners transport products by watercraft on the Ohio and Mississippi Rivers. They are subject to the West Virginia excise tax on special fuels that they purchase outside the State and that are deemed to be consumed by their watercraft while traveling on that part of the Ohio River lying within the territorial boundaries of West Virginia. The tax has been upheld by the West Virginia Supreme Court of Appeals notwithstanding the uncontroverted facts that: (1) some of Petitioners' watercraft do nothing more than pass through West Virginia while in transit between points outside that State without stopping, docking, mooring, or anchoring within West Virginia; and (2) Petitioners frequently cannot determine whether their watercraft traveling on the Ohio River are within or without the territorial boundaries of West Virginia, due to the uncertainties about where those boundaries lie. In addition, the decision by the West Virginia court is contrary to the Court's holding in *Helson and Randolph v. Kentucky*, 279 U.S. 245 (1929) – a case that is directly on point.

In support of Petitioners' request for the grant of a *Writ of Certiorari*, *Amicus Curiae* AWO focuses on two issues raised under the Commerce Clause. The first is whether the West Virginia court erred in failing to follow this Court's holding in *Helson*. That holding has been treated as good law by the Court for over six decades and has never been repudiated. Moreover, it has been cited favorably in recent years by other federal and state courts.

Helson was once viewed by the Court and by commentators as a landmark case. Its reasoning – that the taxation of genuine "interstate commerce" was unconstitutional under the dormant Commerce Clause – was extended by the Court over several decades to apply to many different types of cross-border trade. These extensions of *Helson* created, in part, the "quagmire" that the Court attempted to extricate itself from with its decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Prior to *Complete Auto*, a state could not impose a tax directly on cross-border trade, but it frequently could achieve the same result by imposing the tax on some local activity that was incident to the cross-border trade. Over the past two decades, the Court has made clear that most, if not all, of the extensions of *Helson* have been devitalized by *Complete Auto*.

The core protection in *Helson* against state taxation of travel on interstate waterways, however, has not been repudiated by this Court. If the holding of *Helson* is to be rejected, it should be done by this Court or by Congress after careful review of the many implications of doing so. As the Court recently stated in *Quill v. North Dakota*, 504 U.S. 298 (1992), lower courts should leave to this Court the prerogative of overruling its own decisions. *Quill* also recognized that when an industry has relied on a precedent of this Court, especially one that created a safe harbor from state taxation such as *Helson*, the Congress might be the appropriate body to change the rules.

The second issue addressed in this brief goes to the merits of the holding in *Helson*. The question presented is whether state taxation of interstate travel on navigable waterways is consistent with the Court's current dormant Commerce Clause jurisprudence, assuming, *arguendo*, that the tax satisfies the four-prong test of *Complete Auto*. As argued in detail below, that question should be answered in the negative.

The Court has never held that *Complete Auto* defines the outer limits of the protection provided under the dormant Commerce Clause against overreaching by state taxing authorities. To the contrary, the Court made clear in *Japan Line v. Los Angeles*, 441 U.S. 434 (1979), that a state tax affecting cross-border trade will be struck down if the tax interferes substantially with a clear and well-established federal policy in an area that is preeminently a matter of national concern or creates an enhanced and special risk of double taxation. The West Virginia tax does both.

For over two hundred years, the United States has followed a policy of freeing the use of its navigable rivers from state taxation. That policy was written into law with the Northwest Ordinance of 1787 and the Virginia Compact of 1789 and was embodied in the Commerce Clause and in other guarantees of the federal Constitution. It has been affirmed in state constitutions and in enabling acts admitting states into the Union. It is reinforced by the extensive and almost exclusive national control over the country's navigable rivers. The evidence in this case shows conclusively that the West Virginia tax would undermine that national policy. By implication, the West Virginia action also would undermine the commerce clause protection against taxation by coastal states of interstate and foreign travel on the oceans and on the Great Lakes.

In addition, the West Virginia tax presents a serious and special risk of double taxation. Under the Northwest Ordinance, the territorial boundary of West Virginia is fixed by the location of the Ohio River back in 1787. Rivers, unlike highways, have a tendency to move over time, and the Ohio River is no exception. A watercraft on the Ohio River in interstate commerce is likely to move in and out of the State of West Virginia many times. In most cases, the watercraft operator will not know when the watercraft has entered or left West Virginia territory. Each trip is likely to be different because an operator may steer into or out of

West Virginia territory depending on wind, current, and river traffic.

If West Virginia is allowed to tax the operation of watercraft engaged in interstate travel, other states obviously will obtain the same right to tax. Once other states have adopted similar taxes, disputes among the states regarding the location of watercraft, and thus the amount of fuel consumed while in their territories, will be inevitable. The *Complete Auto* tests provide little or no protection against this type of double taxation, which results from the states taking inconsistent factual (rather than legal) positions. The source of the problem is inherent in the nature of navigable rivers and does not result from overreaching by the states.

In *Helson*, the Court held that states may not impose a tax on fuel used by watercraft engaged in interstate travel on navigable waters, thereby eliminating the problem of real or potential double taxation. That holding was expressed in the legal language of the day – language that the Court rejected in *Complete Auto*. The core doctrine of *Helson*, however, remains sound. By granting *Certiorari*, the Court will be able to reexamine *Helson* in light of current conditions and decide whether West Virginia should be permitted to override the long-standing national policy against state taxation of travel on interstate waterways or whether that decision should be left to Congress.

ARGUMENT FOR GRANTING *CERTIORARI*

This case involves the constitutionality of the West Virginia excise tax on gasoline or special fuels,[2] as it applies to the use of fuel on navigable waters located within the territorial boundaries of West Virginia. By law, the proceeds from the tax are deposited in a road fund to be used only for the construction, reconstruction, maintenance and

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[2]W. Va. Code Sec. 11-15A-13 (1996).

repair of highways and for the repayment of bonds issued for highway purposes.[3] The funds have not been used for any other purpose. The Federal government, moreover, has the exclusive responsibility for maintaining the Ohio River as a navigable waterway. On these facts, the tax cannot be justified as a payment for specific services, and West Virginia has not so contended.

Petitioner, in its petition for a *Writ of Certiorari* and in the court below, has offered several reasons why the decision of the court below should not be allowed to stand. In general, Petitioners' arguments support overturning the West Virginia excise tax as it applies to all uses of fuel by watercraft traveling on the Ohio river.

To avoid repetition, this *Amicus Curiae* brief addresses only the dormant Commerce Clause challenge to the West Virginia excise tax and only with respect to the application of that tax to watercraft engaged in "pass-through" travel – that is, travel through West Virginia from a point outside West Virginia to another point outside West Virginia, without stopping, docking, mooring, or anchoring in West Virginia. The arguments advanced here are applicable not only to taxes imposed with respect to travel on the Ohio River and other parts of the former Northwest Territory, but also to taxes imposed by riparian or coastal states with respect to pass-through travel on the Great Lakes, on the oceans, and on inland waterways outside the Northwest Territory.

I. The Decision Below Improperly Failed to Follow this Court's Holding in *Helson*

A. *Helson* Remains Good Law

This case is governed by the holding of *Helson*. That case upheld the taxpayer's commerce clause challenge to a Kentucky excise tax on gasoline, as it applied to gasoline

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[3]Id. Sec. 11-15A-13(g).

purchased outside that State and used within the State in the operation of an interstate transport business on the Ohio River. The taxpayer operated a ferry boat that traveled back and forth between Kentucky and Illinois. Kentucky sought to impose its excise tax on the taxpayer with respect to the use of fuel by the taxpayer on that part of the Ohio River lying within the territorial waters of Kentucky. In striking down the tax, the Court reasoned that a tax on fuel used by watercraft on an interstate river was, in effect, a tax on the use of an instrumentality of interstate commerce, which it held was barred by the Commerce Clause.

Although Petitioners relied on *Helson* in the proceedings below, the West Virginia Supreme Court of Appeals made no mention of that case in its opinion. Instead, the West Virginia court held that the State's excise tax did not violate the dormant Commerce Clause because it satisfied the four-prong test outlined in *Complete Auto*. By ignoring *Helson* and analyzing the commerce clause challenge to the excise tax only under the four prongs of *Complete Auto*, the West Virginia court must have viewed *Complete Auto* as having devitalized *Helson*.

The Court's opinion in *Helson* is short, and the result reached was uncontroversial in its day. The Court viewed the taxation of fuel used by a ferry engaged in interstate commerce on the Ohio River as obviously inconsistent with prevailing views on the limits on state taxation and perhaps as contrary to the free-river doctrine as well. Unfortunately, the Court expressed this mainstream position in loose language that came back to haunt the Court in later years.

A concurring opinion in *Helson*, written by Justice Stone and joined by Justices Brandeis and Holmes, criticized the majority for its overly broad language. Of course these distinguished jurists were right. *Helson* came to be viewed by the Court and by many commentators as enshrining the now-discredited doctrine that a tax imposed on interstate

commerce *ipso facto* violated the dormant Commerce Clause.

The language used by the Court in striking down the tax in *Helson* was characteristic of the period. That broad language, as applied in other cases, had the effect of invalidating state taxation of cross-border activities having substantial in-state components. These extensions of the holding in *Helson* went well beyond a restriction on state taxation of the interstate use of navigable waterways.[4] At the same time, states that were careful to impose their taxes on a local incident of cross-border activities often had their taxes upheld.[5] The Court recognized that interstate commerce with a significant in-state component could be required to pay its fair share of the costs of state government without violating the dormant Commerce Clause.

The Court's decision in *Complete Auto* unequivocally removed the absolute ban on state taxation of interstate commerce. After *Complete Auto*, it generally was unnecessary for a state, in levying an otherwise permissible tax on a cross-border activity, to specify that the tax was imposed with respect to some local incident of that activity. According to that case, purely formal differences in the drafting of a statute should not be given constitutional significance. The core holding of *Helson*, however, was not implicated by the anti-formalism of *Complete Auto*. The narrowest plausible reading of *Helson* is that a state cannot tax the use of

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[4]See, e.g., *Freeman v. Hewit*, 329 U.S. 249 (1946) (holding that a sale of stock by the trustee of an Indiana estate through the New York stock exchange could not be taxed by Indiana).

[5]See, e.g., *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) (upholding a tax on the income of a corporation conducting a cross-border business levied by the state in which the taxpayer had a sales office); *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948) (upholding a tax on an interstate pipeline on the grounds that it was a tax on local activities).

fuel on pass-through travel on interstate rivers.[6] That protection is a substantive right against state interference with interstate commerce with deep roots in America's colonial history.

In *United Air Lines v. Mahin*, 410 U.S. 623 (1973), decided just four years before *Complete Auto*, this Court reaffirmed the core holding of *Helson*, interpreting it as providing protection against state taxation of watercraft engaged in interstate travel on a navigable river.[7] *United Air Lines* was part of a series of cases, culminating in *Complete Auto*, that expanded a state's right to tax interstate commerce and that served as harbingers of the Court's new viewpoint. The timing of *United Air Lines* makes it unlikely that the Court had intended to devitalize *Helson* a few years later in *Complete Auto*. Furthermore, *Helson* has been cited with approval by both federal and state courts since *Complete Auto* was decided.[8] Although *Helson* is no longer the landmark decision it was considered in 1929, it remains an important

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[6]The holding in *Helson* went beyond imposing a commerce clause bar on state taxation of pass-through traffic because the taxpayer in that case presumably docked its ferry boat in the taxing state when it took on and let off passengers. In *United Air Lines*, however, the Court described *Helson* as a case in which "the ferry boat was asked to bear more than its 'nondiscriminatory share' [of the tax burden] when it was taxed only for passing through Kentucky waters." 410 U.S. at 630, n.7

[7]*United Air Lines* upheld an Illinois tax on the storage of aviation fuel prior to its being loaded on the taxpayer's airplanes for use in interstate commerce. See below at page 19.

[8]See, e.g., *Sea-Land Services, Inc. v. San Juan*, 505 F. Supp. 533 (1980); *Master Craft Engineering, Inc. v. Michigan*, 366 N.W.2d 235 (1985); *Delta Air Lines v. Florida*, 455 So.2d 317 (1984); *Senn Trucking Co. v. Wasson*, 312 S.E.2d 252 (1984); *Cargill, Inc. v. Lindley*, 448 N.E.2d 148 (1983); *Missouri v. L & L Marine Service, Inc.*, 647 S.W.2d 524 (1983); *Midwestern Gas Transmission Co. v. Wisconsin*, 267 N.W.2d 253 (1978).

precedent of this Court that the West Virginia Supreme Court of Appeals was not free to ignore.

B. If *Helson* Is to Be Overturned, It Should Be Done by the Court or Congress

If the holding of *Helson* is to be rejected, it should be done explicitly by this Court or by the Congress after careful review of the many implications of doing so. It should not be dispatched *sub silentio* by a lower court based on its reading of the entrails of *Complete Auto*. The use of fuel on the navigable waterways of the United States by watercraft engaged in interstate commerce has been free of state taxation since the birth of the republic. The decision below is a radical departure from that free-river doctrine. To protect its own constitutional prerogatives and to protect the substantial and reasonable reliance interests of the several industries that have flourished under the protection of *Helson*, this Court should review the rogue decision of the West Virginia Supreme Court of Appeals.

An important reason that the Court has traditionally given for granting a *Writ of Certiorari* is to protect the integrity of its prior decisions. As this Court recently emphasized in *Quill*,

> "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other lines of decisions, [the lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[9]

Quill also acknowledged the important role that the Court performs through its review of lower court decisions in protecting reasonable and substantial reliance interests. In *Quill*, the Court acted to protect the reliance interests of

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[9] *Quill*, 540 U.S. at 321, quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (Scalia, J. concurring).

the mail-order industry. *Amicus Curiae* is requesting in this case that the Court protect the reasonable reliance interests of the interstate waterway industry.

Protection by the Court of the settled expectations fostered by *Helson* is critical to Petitioners' cargo-carrying watercraft business and to the tug and barge businesses represented by *Amicus Curiae*. The cost of fuel is one of the major variable costs of using the navigable rivers. Petitioners and the tug and barge operators enter into contracts that are based on estimates of the future cost of fuel, and they plan their capital investments accordingly. If the Court devitalizes *Helson* and other states pass taxes similar to West Virginia's, the cost structure of the industry would be upset significantly, and settled, reasonable expectations would be frustrated.

Helson also protects other persons engaged in interstate and foreign commerce from overreaching by state tax authorities. The beneficiaries of that protection include taxpayers operating cargo-carrying watercraft in interstate or foreign commerce on the Great Lakes or along the coasts of the United States and commercial airline companies that fly over states in the course of interstate or foreign commerce.[10]

II. The West Virginia Tax is Inconsistent with the Court's Current Commerce Clause Jurisprudence

A. Overview

In the case below, the West Virginia Supreme Court of Appeals concluded that the disputed excise tax on river-travel fuel met the four-prong test of *Complete Auto*. Petitioners dispute that conclusion in their petition for a *Writ*

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[10]Since 1990, the airlines also have been protected by explicit Congressional action. See 49 U.S.C. § 1513(f), recodified as 49 U.S.C. §40116(c) (a state may not levy a tax on a flight or on an activity or service on a flight if such flight does not take off or land in the state).

of Certiorari. To avoid repetition of arguments, we do not address that question in this *Amicus Curiae* brief. The discussion below assumes, for the sake of this argument only, that the disputed excise tax somehow satisfies the four prongs. The argument presented here is that the tax is inconsistent with the Court's current dormant clause jurisprudence even if it would pass muster under *Complete Auto.*

Complete Auto is not the *alpha* and *omega* of this Court's dormant commerce clause analysis of state taxing statutes, notwithstanding its importance. Many recent disputes over the validity of state taxes under the Commerce Clause have been resolved by this Court without mentioning that case, or by mentioning it only in passing.[11] Nor does *Complete Auto* define the outer limits of the protection against state overreaching provided under the dormant Commerce Clause. It is a test, as this Court stated in *Jefferson Lines*, that the Court has "often applied, and sometimes refined." *Oklahoma Tax Commission v. Jefferson Lines, 115 S.Ct. 1331, 1337* (1995). It is the refinements of the *Complete Auto* test that are of interest here.

Undoubtedly the most significant refinement of that test was made by the Court in *Japan Line v. Los Angeles*, 441 U.S. 434 (1979). *Japan Line* held that a fairly-apportioned California property tax applied to cargo containers located temporarily in California and owned by Japanese shipping companies violated the dormant Commerce Clause not-

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[11] The four-prong test of *Complete Auto* played little or no role, for example, in the following major dormant commerce clause cases: *West Lynn Creamery, Inc. v. Massachusetts*, 114 S. Ct. 2205 (1994); *Kraft General Foods, Inc. v. Iowa*, 505 U.S. 71 (1992); *New Energy Company v. Limbach*, 486 U.S. 269 (1988); *Bacchus Imports, Ltd. v. Dias*, 486 U.S. 263 (1984); *Tyler Pipe, Inc. v. Washington*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

withstanding the fact that the four prongs of the *Complete Auto* test were satisfied.[12] The Court went beyond the *Complete Auto* test because the challenged tax threatened to frustrate federal policy in an area that is preeminently a matter of national concern[13] and that presented an enhanced and special risk of multiple taxation.[14]

The extra tests of *Japan Line* are by no means the only "refinement" of the *Complete Auto* test. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court invoked the preemption doctrine under the Commerce Clause to overturn an Arizona use tax on diesel fuel as applied to the use of fuel by non-Indian corporations on roads built and maintained by the Tribe or by the federal Bureau of Indian Affairs. No mention was made of the *Complete Auto* tests, which were undoubtedly satisfied by the "plain vanilla" use tax on fuel.

Another major case that "refined" the four-prong test of *Complete Auto* is *Quill*, discussed in detail above.[15] In *Quill*, the Court bifurcated the first-prong of that test (nexus) into a commerce clause component and a due process component – in effect creating a five-prong test. That implicit new prong apparently was created to protect reasonable reliance interests and to preserve the ability of Congress to regulate the mail-order industry.[16]

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[12]441 U.S. at 445-46.

[13]441 U.S. at 448.

[14]441 U.S. at 446.

[15]See supra pages 11-12.

[16]See Richard D. Pomp and Michael J. McIntyre, "State Taxation of Mail-Order Sales of Computers after Quill: An Evaluation of MTC Bulletin 95-1," 11 STATE TAX NOTES 177-184 (July 15, 1996); Charles Rothfeld, "Quill: Confusing the Commerce Clause," 3 STATE TAX NOTES 111-115 (July 27, 1992).

As discussed below, the West Virginia tax on fuel consumed by watercraft engaged in interstate commerce on the Ohio River raises national, and by implication, international interests of special concern. In the language of *Japan Line*, the offending tax would frustrate a federal policy clearly defined by the Commerce Clause in an area that is preeminently a matter of national concern. The West Virginia tax also creates an enhanced and special risk of multiple taxation – a risk that is not easily avoided except by striking down the offending tax. These special features of the West Virginia tax remove it from the "plain vanilla" commerce clause cases in which the Court has applied an unmodified *Complete Auto* test.

B. The Free-River Doctrine Is a Longstanding Federal Policy in an Area that is Preeminently a Matter of National Concern.

Disputes over the navigable rivers of the United States have had a profound influence on the course of American history. Internecine battles over control of water highways were commonplace before the ratification of the federal Constitution in 1789.[17] Those battles were very much on the minds of the delegates to the Constitutional Convention in Philadelphia.[18]

In an attempt to create a legal framework that would minimize commercial warfare among the states, the United States very early established the doctrine that the rivers should be free of state taxation. The Ordinance of 1787 for the Government of the Northwest Territory (the region

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[17] William J. Hull & Robert W. Hull, THE ORIGIN AND DEVELOPMENT OF THE WATERWAYS POLICY OF THE UNITED STATES, p. v (1967).

[18] See Catherine Drinker Bowen, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION – MAY TO SEPTEMBER 1787, p. 9(1966).

north of the Ohio River and east of the Mississippi, comprising what are now the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota) is an early manifestation of the free-river doctrine. It stated:

> The navigable waters leading into the Mississippi and Saint Lawrence . . . shall be common highways, and forever free . . . *without any tax*, impost, or duty therefor.[19]

Similarly, the Virginia Compact of 1789 provided that the "use and navigation of the river Ohio. . . shall be free . . . to the citizens of the United States."[20]

The free-river doctrine enshrined in these early documents was reinforced by the guarantees of free trade and travel provided by the Constitution through the Commerce Clause, the Duty of Tonnage Clause,[21] the Import-Export Clause,[22] and the prohibition of federal and state duties on exports.[23] Versions of the free-river doctrine were incorporated into many of the enabling acts under which new states were admitted to the Union after 1790; that doctrine also was incorporated into some state constitutions and statutes.[24]

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[19]Ordinance of 1787: The Northwest Territorial Government, U.S.C.A. Const. Art. 1 The Organic Laws of The United States 17, 22 (emphasis added).

[20]13 Henning's Stat. at L., c. 14. Treaties entered into by Great Britain prior to the founding of the United States provided for the free use of the waterways. Hull & Hull, supra note 17, at 3.

[21]U.S. Const. art. I, sec. 10, cl. 3.

[22]U.S. Const. art. I, sec. 10, cl. 2.

[23]U.S. Const. art. I, sec. 9, cl. 5.

[24]See, e.g., Ala. Enabling Act, Mar. 2, 1819, Sec. 6, 3 Stat. 492; Ala. Const. art. I, Sec. 24; Alaska Const. art. VIII, Sec. 14; Alaska Stat. Sec. 38.05.127 (1995); Cal. Enabling Act, Sept. 9, 1850, Sec. 3, 9 Stat. 452; Cal. Gov. Code Sec. 39933 (1996); Fla. Enabling Act, Mar. 3, 1845, Sec. 3, ; Ill. Enabling Act, Apr. 18, 1818, Sec. 4, 3 Stat. 428-31; Ind.

Not only is the free-river doctrine a long-standing federal policy, but also it operates in an area that is preeminently a matter of national concern. As the West Virginia Supreme Court of Appeals conceded, the federal government is responsible for the regulation, servicing, and maintenance of the inland waterways system of which the Ohio River is a part.[25]

The West Virginia tax should be evaluated against this backdrop of an extensive pattern of federal regulation and control and a clear, 200- year-old federal policy in favor of interstate travel on navigable waters free of state taxation. The teaching of *Japan Line* is that the extensive and longstanding federal interests that are threatened by the West Virginia tax merit a more sensitive analysis than that provided by the four-prong test of *Complete Auto.*

One can easily see that the West Virginia tax could threaten federal interests in free travel on navigable waters by imagining how watercraft operators are likely to respond to a state tax on pass-through traffic. Such a tax would encourage those operators to avoid passing through the

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Enabling Act, Apr. 19, 1816, Sec. 4, 3 Stat. 289-91; Ia. Enabling Act, Mar. 3, 1845, Sec. 3, 5 Stat. 743; La. Enabling Act, Feb. 20, 1811, Sec. 3, 2 Stat. 642; Minn. Enabling Act, Feb. 26, 1857, Sec. 2, 11 Stat. 166; Minn. Const. art. II, Sec. 2; Miss. Enabling Act, Mar. 1, 1817, Sec. 4, 3 Stat. 349; Miss. Code Ann. Sec. 51-1-4 (1996); Mo. Enabling Act, Mar. 6, 1820, Sec. 2, 3 Stat. 546; Ohio Enabling Act, Apr. 30, 1802, Sec. 5, 2 Stat. 174; Or. Enabling Act, Feb. 14, 1859, Sec. 2, 11 Stat. 383; Tenn. Code Ann. Sec. 29 (1996); Wis. Enabling Act, Aug. 6, 1846, Sec. 3, 9 Stat. 57; Wis. Const. art. IX, Sec. 1.

[25] *Hartley Marine Corp. v. Mierke,* 474 S.E.2d 599, 604-05 (1996). See, e.g. 33 U.S.C. Secs. 1-2805 (1994) (designating regulations concerning operation of navigable waters); 49 U.S.C. Secs. 101-80504 (1994) (denoting various regulations pertinent to federal transportation policies and programs); and 33 U.S.C. Sec. 5 (1994) (prohibiting the levying of tolls or operating charges on watercraft passing through any canalized river).

territory of the taxing state. In the case of the West Virginia tax, they are encouraged to hug the Ohio side of the waterway, thereby complicating traffic flows, increasing costs, and enhancing the risk of accidents. If a coastal state like Rhode island were to adopt a comparable use tax, ships traveling up the east coast of the United States would have to weigh the costs in time and fuel of staying outside Rhode Island territorial waters against the amount of tax due from traveling within those waters. Forcing watercraft owners to make such choices is inconsistent with the free-river doctrine and with the values that the Founding Fathers attempted to enshrine in the Commerce Clause.

C. The West Virginia Tax Poses a Special and Enhanced Risk of Multiple Taxation

The West Virginia excise tax raises a unique issue of multiple taxation which this Court, as in *Japan Line*, is unable to resolve except by striking down the tax. Unlike other cases of double taxation addressed by this Court, the defect in the West Virginia tax arises from the nature of rivers and the way some state boundaries, such as the boundary between West Virginia and Ohio, have been defined.

The offending West Virginia tax applies to fuel purchased outside of Ohio and used on that part of the Ohio River that is within the territorial waters of the State of West Virginia. The fatal flaw in this scheme is that unlike a highway, the Ohio River does not have sharply defined and reasonably permanent boundaries. Petitioners' watercraft are in West Virginia when traveling between river mile markers 40 and 317 in waters lying east of the low water mark on the west bank of the Ohio River as it existed in 1787.[26] According to the West Virginia Supreme Court of Appeals, improvements and changes along the Ohio River

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[26] *Hartley Marine*, supra note 25 at 602 n.5.

that have occurred since 1787 make it impossible for Petitioners to determine precisely how many miles their watercraft travel in West Virginia.[27]

One of the virtues of *Helson* is that watercraft engaged in the interstate use of the waterways are protected from the risk of multiple taxation. This Court emphasized this attribute of *Helson* in *United Air Lines*.

> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading. . . continues to serve rational purposes. Retaining the line at this point minimizes the *danger of double taxation*. . . .[28]

The near impossibility of knowing the number of miles that watercraft travel within West Virginia makes even-handed enforcement of the tax unattainable. The enforcement problem will become even greater if other states, with the tacit approval of this Court, adopt a similar tax. Even if the taxing states administer their taxes in good faith, they are likely to take inconsistent approaches to the problem of determining how long a river vessel spends in each state. In that event, multiple taxation will be nearly inevitable. The taxpayer's predicament will be exacerbated by the presumption of correctness that oftentimes accompanies a state assessment; the sad reality is that the taxpayer will be unable to prove what is inherently unknowable.

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[27]Id.

[28]410 U.S. at 629 (emphasis added).

CONCLUSION

For the foregoing reasons, this petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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